

No. 5902

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNDA MUNOZ, by O. A. Ellis
(her attorney in fact),
Appellant,

vs.

AUBURN LUMBER COMPANY (a corpora-
tion), and W. N. TEN EYCK, Re-
ceiver of Christmas Hill Mining
Company (a corporation),
Appellees.

BRIEF FOR APPELLANT.

DANIEL BARTON,
704 Market Street, San Francisco,
Attorney for Appellant.

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STATEMENT OF CASE.

This is an appeal from an order of the District Court of the United States in and for the Southern Division of the Northern District of California, denying the petition of the plaintiff for an injunction against the said defendants in an effort to prevent the appointment of a receivership of the Christmas Hill Mining Company, a corporation, duly organized and incorporated under and by virtue of the laws of the State of Nevada, and having a permit to operate in the State of California, and did operate

a mining property, situated at Butchers Ranch, County of Placer, State of California, and known and particularly described as the Christmas Hill Mine, being named after one of the group of claims constituting the property of the said corporation.

That during the operation of the Christmas Hill Mining Company in Placer County, California, the corporation, became indebted for goods, wares, and merchandise to the defendant, Auburn Lumber Company, a corporation, that the defendant brought action in the Superior Court of the County of Placer, State of California for the debt, and procured judgment against the said Christmas Hill Mining Company, a corporation.

That during all of the time that said litigation was pending in Placer County instituted by the defendant, herein, Auburn Lumber Company, a corporation, the plaintiff, herein, was and now is a resident of the State of New York, and had appointed O. A. Ellis, her attorney in fact, to represent her interests in the State of California, by her instrument in writing, and that said O. A. Ellis, did represent the said plaintiff at all of the times herein and preceedingly referred to in all matters of business.

And pursuant to the judgment procured by the defendant, Auburn Lumber Company, a corporation, an execution was issued and a levy made upon the personal property of the plaintiff, held, under lease by the defendant, Christmas Hill Mining Company, a corporation, that the said property consisted of mining and milling machinery then situated at Butchers Ranch, County of Placer, upon the premises

of the said Christmas Hill Mining Company, a corporation, that plaintiff by and through her attorney in fact, Mr. O. A. Ellis, filed her claim for delivery of the said property to her (replevin) and served same upon the sheriff of Placer County, by whom the levy was made and was subsequently released by the said sheriff by reason that defendant, Auburn Lumber Company, a corporation, could not or did not bond against the claim of plaintiff.

That upon the application for the defendant, herein, to the Superior Court of the State of California in and for the County of Placer, the defendant, W. N. Ten Eyck, was appointed Receiver for the Christmas Hill Mining Company, a corporation, and failed to qualify by reason of the fact that he or the defendant, whom he was serving could not procure the required bond.

That by reason of the preceding state of facts, plaintiff filed her bill of complaint in the District Court of the United States and is hereby referred to and made part hereof though as if repeated *haec verba* and attached thereto and made part thereof the personal property claimed by plaintiff and that said exhibit was marked "Exhibit A" that a *subpoena respondendum* was thereon issued by the clerk of the Court, that at the said time of filing the bill of plaintiff an "restraining order" was procured signed by the Honorable Harold Louderback, Judge of the District Court of the United States. (Pages 1 to 12, Transcript of Record.)

That the said cause was heard on oral argument of both the plaintiff and defendant in the District

Court of the United States in Sacramento, California, and at the request of counsel for defendant, affidavits were prepared and filed and also by the plaintiff which will appear from the transcript of the record on file herein, that on the 14th day of June, 1929, the restraining order heretofore referred to in said matter was set aside and dissolved by the Honorable A. F. St. Sure, United States District Judge. (Page 59, Transcript of Record.)

That the affidavits filed in support of the prayer for injunction on behalf of the plaintiff are those of C. A. Ackerman, James Corey, Leland Daugherty, and Oscar A. Ellis, respectively, and on behalf of defendants, J. W. Graham, J. E. Knapp, George Mather, R. A. Murry, E. T. Robie, G. W. Seaton, W. N. Ten Eyck, respectively, all of which appear upon the transcript of the record on file. That the affidavit offered for and in behalf of the plaintiff herein are made under oath by the subscribers thereof from actual knowledge of the conditions of the Christmas Hill Mining Property, herein, and precedingly mentioned and described, that the affidavits filed on behalf of the defendant were in the way of an attempt of all of the said parties by whom the affidavits were made in the nature of experts while no qualification appears or either of the said parties being such experts as to the valuation of mining and milling machinery nor as operators of mining property.

That the plaintiff, herein, a resident of the State of New York became the owner of the mining and milling machinery, situated, at Butchers Ranch, County of Placer, State of California, upon the

premises of the Christmas Hill Mining Company, by transfer made to her by a bill of sale by the Ellis Mill Company, dated September 18, 1928, recorded in the office of the County Recorder of the County of Placer, in the town of Auburn, California, that said defendant by reason thereof had notice of her said ownership all of the times herein mentioned.

THE ISSUES.

The bill of complaint alleges her ownership of that certain personal property, consisting of mining and milling machinery, that she was the owner thereof, that said mining and milling machinery was situated at Butchers Ranch upon the premises of the Christmas Hill Mining Company, County of Placer, State of California, that said bill of complaint of plaintiff was verified by her attorney in fact, whom, was familiar with all of the facts in connection with the transfer of said property to the plaintiff.

That in view of the fact that plaintiff had no business dealing with the said defendants; or either of them, in the purchase of said defendant's goods, wares, or merchandise, that plaintiff had no interest in the Christmas Hill Mining Company, a Nevada Corporation, who by reason of the fact that said corporation became the debtor of the defendant in the purchase of supplies during its operation of the Christmas Hill Mining Company property and that the said corporation became unable to pay its said obligations and that the defendant herein brought its said action in the Superior Court of Placer County in an effort to

collect its said indebtedness from the defendant, Christmas Hill Mining Company, a corporation, that judgment was procured and execution issued thereupon and a levy made by the sheriff of the County of Placer upon the said personal property of the plaintiff, pursuant thereto, plaintiff through her attorney in fact and representative in the State of California, filed with the sheriff of said County of Placer her affidavit of claim and delivery as provided for in such causes.

Code of Civil Procedure of California, Chapter II, Part II;

Code of Civil Procedure, Secs. 509-521, inc.

That thereafter an application for a Receiver upon the petition of defendant was made to the Superior Court of Placer County and upon hearing before the Court: and after due notice, the defendant W. N. Ten Eyck, was appointed as Receiver of the property of the plaintiff and that said Ten Eyck was unable to and did not qualify as said Receiver.

That said W. N. Ten Eyck, is the person by whom the negotiation for the sale of the Christmas Hill Mining Company, mining claims to the Christmas Hill Mining Company, a corporation, that there became due to said W. N. Ten Eyck, for the consummation of the sale of said mining claims to the corporation a compensation for his brokerage on said sale and that the same was due to him at the time of the commencement of the action of the defendant, Auburn Lumber Company, a corporation, and at the time of his appointment as Receiver by the Court for the property of plaintiff, herein.

That in view of the conduct of the defendant, its agents, and servants, and the appointment of a receiver by the Superior Court of Placer County, appointing said Ten Eyck, Receiver of her property and unable to procure any redress from the drastic measure resorted to by the said defendant, plaintiff was compelled to seek relief by the filing of her bill of complaint in equity in the District Court of the United States for the Northern District of California and in her said bill of complaint praying for an injunction against the defendant, hence, this appeal to the "Circuit Court of Appeals of the Ninth District."

That no answer to the bill of complaint has been filed the point at issue being the relief sought by plaintiff enjoining the said defendant, Auburn Lumber Company, its agents, servants, attorneys, or any one representing it to refrain from further proceeding with its said action or the functioning of said Receiver and selling or disposing of the property of the plaintiff as herein and precedingly mentioned.

POINTS AND AUTHORITIES.

The writ of injunction, prayed for in the complaint of plaintiff, herein, upon hearing of the order to show cause why the restraining order should not be made permanent, being denied by the Court, that the restraining order granted being set aside and an order made denying the injunction. (Page 59, Transcript of Record.)

“A writ of injunction may be defined as a judicial process, operating in personam, and requiring the person to whom it is directed to do or refrain from doing a particular thing.”

High on Injunctions, Sec. 1;

Lube Eq. Pleading, p. 61, Sec. 44.

“Injunctions when granted;—Writs of injunction may be granted by any Justice of the Supreme Court in cases where they might be granted by the Supreme Court; and any by Judge of a District Court in cases where they might be granted by such court.”

Judicial Code, Sec. 264;

Statutes at L. 36, 1162.

In the case at bar, the plaintiff, a citizen and resident of the State of New York, filed her bill of complaint in equity praying for relief against the defendant. The defendant having applied for and procured an order of a State Court appointing a Receiver to deprive her and separate her from the use and benefit of her property and after appealing to said State Court for relief was denied such, hence, by the required steps the case is brought into this Court by the plaintiff upon appeal from an order denying her prayer for injunction against the defendants in the District Court of the United States for the Northern District of California.

That a restraining order was granted by one of the Judges of the said District Court upon the verified bill of complaint filed in said cause and which plaintiff believes states a cause in equity against the said defendant and is a part of the transcript of the

printed record of appeal in this case. (Page 1, Transcript of Record.)

But at the time of the hearing before the Honorable A. F. St. Sure, a Judge of the District Court and solely upon the oral argument of counsel and the citation of Equity Rule No. 73 as to the deficiency of notice on the part of defendant, that said Rule No. 73 reads in part as follows, to-wit:

“Upon two days’ notice to the party obtaining such temporary restraining order, the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.”

That no notice as required by the said Rule No. 73 was given to the plaintiff nor her counsel by said defendant that it was going to proceed to make any effort to have or to move the Court for any dissolution or modification of the said restraining order then in force and existence against the said defendant until the day of the hearing in said District Court in Sacramento, California.

Appeals in proceeding for injunction and receivers, the same having been taken in and within the time prescribed by the statute

“where upon a hearing in equity in a District Court or judge thereof in vacation, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree or an application to dissolve an injunction.”

Judicial Code, Sec. 129;

U. S. Comp. St., 1121, 1918.

In general—

“An appeal from an interlocutory decree which grants, continues, refuses, dissolves or refuses to dissolve an injunction may be taken to the Circuit Court of Appeals, for the circuit in which that decree was rendered, at any time within thirty days from the entry of the decree.”

A. D. Howe Machine Company v. Dayton, 210 Federal 801;

J. D. Randall Co. v. Foglesong Mach. Co., 200 Federal 741;

Thorpe v. National City Bank, 274 Federal 200.

CONCLUSION.

JURISDICTION—The Circuit Court of Appeals,

“has power to affirm, modify, or reverse any judgment lawfully brought before it for review, or to direct such judgment to be rendered, or further proceedings to be had, as the justice of the case may require.”

Grammer v. Fenton, 268 Federal 943;

Rep. Iron Works v. Youngstown, 272 Federal 386;

Thorp v. National City Bank, 274 Federal 200.

The plaintiff filed in the District Court her bill of complaint in equity, a restraining order was issued against the defendant and signed by one of the Judges of the lower Court, that matter came on for hearing on a certain day upon the said bill of complaint and oral argument and subsequent affidavits; all of which are hereby referred to and made part hereof and the injunctive relief prayed for by the plaintiff was

denied and further plaintiff and appellant was without any adequate remedy at law.

That the attention of the Court is hereby respectfully called to the affidavits of O. A. Ellis, pages 13 to 19 inc. of the transcript of the record, James Corey, Leland Daugherty and A. C. Ackerman, respectively, pages 24 to 29 inc. of the transcript of the record on file. These affidavits are made by responsible men whom were in charge and in the service of the Christmas Hill Mining Company, a corporation, one of the defendants named, and the testimony if taken by deposition and question and answer would be substantially the same.

The controverting affidavits presented to the lower Court by the defendant shows on the face of the affidavits of R. A. Murry and Frank Enquist, respectively, a dissatisfied and disgruntled nature or attitude towards Mr. O. A. Ellis, by whom the Ellis Mill Company was represented in the transactions leading up to this appeal; likewise the affidavit of J. E. Knapp, as to a valuator, he, being engaged in the same business as Mr. R. A. Murry, both second hand machinery brokers, the Ellis Mill Company did enter into an agreement with said Christmas Hill Company, to lease certain milling and operating machinery for its operation at Butcher Ranch in Placer County and that plaintiff and appellant became the owner of said mining and milling machinery by bill of sale made to her by the said Ellis Mill Company as security for a loan made to the company in order to finance the Christmas Hill Company. (Pages 22-23 and 24, Transcript of Record.)

That the equipment leased by the Ellis Mill Company as described in Exhibit A (page 20) of the record transcript and accepted by resolution of the Board of Directors to the Christmas Hill Mining Company, at Reno, State of Nevada, May 23, 1927, and recorded in the office of the County Recorder of Placer County, California, that the Giant Mill and nearly all of said milling machinery leased to the said Christmas Hill Mining Company by the Ellis Mill Company is protected by United States Patent, and not in possession of second hand dealers.

That the lower Court erred, by reason of it refusing to grant the prayer of appellant: as prayed for in her bill of complaint upon the hearing of the restraining order granted and as set forth in the assignment of error. (Page 60, Transcript of Record.)

Wherefore appellant prays that said decree of the District Court be reversed, and that said District Court for the Northern District of California, be ordered to enter a decree reversing its interlocutory decree made and entered in said cause or that the Circuit Court of Appeals for the Ninth District shall reverse and enter a proper decree on the record.

Dated, San Francisco,
February 19, 1930.

Respectfully submitted,

DANIEL BARTON,

Attorney for Appellant.